Supreme Court, U. S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

No. 79-1177

IN THE

Supreme Court of the United States

October Term, 1979

LLOYD MCBRIDE, PRESIDENT AND FRANK MCKEE, TREASURER, FOR AND ON BEHALF OF THE UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC AND ITS ENTIRE MEMBERSHIP, AND LYNN WILLIAMS, JOSEPH ODORCICH, LEON LYNCH, ERNEST JANAK, ROBERT CLOWERS, DICK EAGLEHOUSE, ROBERT KELLY, AND FRANK ANGLIN,

Petitioners,

v.

ROCKEFELLER FAMILY FUND, NEW WORLD FOUNDATION, FIELD FOUNDATION, SAMUEL RUBIN FOUNDATION, J. M. KAPLAN FUND, INC., OTTINGER FOUNDATION, COMMUNITY FUNDS, INC., YOUTH PROJECT, AND ASSOCIATION FOR UNION DEMOCRACY,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONERS

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
DAVID M. SILBERMAN
Bredhoff, Gottesman, Cohen & Weinberg
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

3 PRINTED IN USA 3

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1177

LLOYD MCBRIDE, PRESIDENT AND FRANK MCKEE, TREASURER, FOR AND ON BEHALF OF THE UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC AND ITS ENTIRE MEMBERSHIP, AND LYNN WILLIAMS, JOSEPH ODORCICH, LEON LYNCH, ERNEST JANAK, ROBERT CLOWERS, DICK EAGLEHOUSE, ROBERT KELLY, AND FRANK ANGLIN,

Petitioners,

v.

ROCKEFELLER FAMILY FUND, NEW WORLD FOUNDATION, FIELD FOUNDATION, SAMUEL RUBIN FOUNDATION, J. M. KAPLAN FUND, INC., OTTINGER FOUNDATION, COMMUNITY FUNDS, INC., YOUTH PROJECT, AND ASSOCIATION FOR UNION DEMOCRACY,

Respondents.

REPLY BRIEF FOR PETITIONERS

Respondents, in their brief in opposition (hereinafter "Br. Op."), misstate the legislative history of Title IV of the LMRDA, and make a number of assertions pertaining to the merits of petitioners' federal and state claims which warrant this reply.

I. THE FEDERAL CAUSE OF ACTION

A. Respondents assert that

> "Congress debated at length and rejected two different bills (S. 748 and H.R. 8342, 86th Congress, 1st Sess.)—

> each of which would have permitted private rights of action by union members under Title IV *regardless of the identity of the transgressors*—and chose, instead, to confer exclusive enforcement powers on the Secretary of Labor."

Br. Op. 5 (emphasis added). Respondents argue that the rejection of bills which would have allowed private actions against employers is "controlling" and precludes the implication of a private cause of action (*Id.* at 6).

But, contrary to respondents' assertion, the enforcement provisions in the rejected bills they cite dealt only with union member suits *against unions, for union violations*. Thus, S. 748 provided:

> "An action or proceeding may be maintained in any court of competent jurisdiction by or in behalf of members of a labor organization to obtain appropriate relief *with respect to any act or omission of such labor organization, or of any officer, agent, or other representative thereof,* which is in violation of the provisions of this section or section 303 . . ."[1]

And H.R. 8342 authorized a union member "aggrieved by any violation of Section 401," upon exhausting union remedies, to

> "bring a civil action *against such labor organization* in any district court in the United States for the district having jurisdiction of such labor organization *to prevent and restrain such violation*. . . ."[2]

Respondents thus proceed from an incorrect premise. Neither the bills whose enforcement approach Congress rejected, nor that which Congress enacted, expressly dealt with the question of enforcing the ban on employer contributions. The situation is as we described it in the Petition (p. 11):

[1] S. 748, § 302, reprinted in NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Volume I (hereinafter "I Leg. Hist.") at 112 (emphasis added).

[2] H.R. 8342, § 402(a), reprinted in I. Leg. Hist. 727-728 (emphasis added). See also *id.* at 775.

> "Title IV neither expressly authorizes nor expressly forbids a cause of action against employers. And the legislative history is totally silent on the question. Congress, having imposed a lone obligation upon employers in a title otherwise addressed to unions, did not focus upon the means by which that lone obligation was to be enforced."

B. Respondents, in an effort to draw sustenance from this Court's recent opinion in *Transamerica Mortgage Advisers Inc.* v. *Lewis,* —— U.S. ——, 48 L.W. 4001 (1979), declare:

> "In view of the express and exclusive remedy provided by Congress, as this Court noted in *Transamerica Mortgage Advisers Inc.* v. *Lewis, supra,* 48 L.W. at 4003, '. . . , it is highly improbable that Congress absentmindedly forgot to mention an intended private right of action (citations omitted).' "

Br. Op. 7. But the words in *Transamerica* which Respondents have omitted and replaced with dots are critical to understanding why that opinion does not apply here. In *Transamerica,* the issue was whether clients have an implied cause of action for damages and other monetary relief against investment advisers who violate § 206 of the Investment Advisers Act. This Court enumerated the "judicial and administrative means" which "Congress expressly provided" against investment advisers who violate § 206: criminal prosecution, civil actions by the SEC "to enjoin compliance," and authorization to the SEC "to impose various administrative sanctions on persons who violate . . . § 206." *Id.* at 4003. The Court then continued:

> "In view of these *express provisions for enforcing the duties* imposed by § 206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.' "

Ibid (emphasis added). Thus the key to this Court's analysis in *Transamerica* was that Congress had specifically addressed the question and legislated "express provisions for enforcing the duties," making it "highly improbable"

that Congress intended other means of enforcement which were not similarly expressed. But this analysis is not applicable to the instant case, for here Congress enacted *no* "express provisions for enforcing the duties" imposed upon employers by § 401 (g) of the LMRDA. We do not ask this Court to conclude that Congress "absentmindedly forgot to mention" an *additional* means of enforcing those duties; we ask this Court to conclude that Congress could not have intended that those duties would go without *any* means of enforcement.

C. In urging the latter point, we have cited *Wyandotte Co.* v. *United States*, 389 U.S. 191, 200, 204 (1967), as indicative that Congress is not to be presumed, absent "persuasive indication," to have intended the express statutory procedures to be "exclusive of all others" where that presumption "would produce the result, extraordinary in our jurisprudence, of a wrongdoer shifting the responsibility for the consequences of his [wrong] onto his victim." (Petition at 12). Respondents answer that in *Wyandotte* "this Court was [not] concerned . . . with the implication of a private right of action under a federal statute . . ." Br. Op. 8. But that is not this Court's view. Only last Term this Court cited *Wyandotte* as exemplifying the following principle:

> "[A] private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute."

Cannon v. *University of Chicago*, 441 U.S. 677, 703 & n. 35.[3]

[3] Respondents' attempted reliance (Br. Op. 10) upon *Auto Workers* v. *Right To Work Foundation*, 590 F.2d 1139 (D.C. Cir. 1978) is unavailing. The holding in that case was that when the Secretary of Labor has determined that a management consultant is not required to file reports with the Secretary under § 203(b)(1) of Title II of the LMRDA, 29 U.S.C. § 433(b)(1), and thus has elected not to bring the suit to compel filing which is expressly authorized in § 210 of that title, 29 U.S.C. § 440, unions have no implied cause of action to compel management consultants to file reports with the Secretary. Reporting provisions are in any event unlikely candidates for implication of private causes of action, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979), but the more important point, which the District of Columbia Circuit found decisive, is that Congress had considered and expressly rejected creating a dual enforcement mechanism under which private parties as well as the Secretary could sue to compel report filing, opting instead to empower only the Secretary to sue. 590 F.2d at 1154-55.

That Congress expressly rejected a dual enforcement mechanism in Title II is, of course, no indicator of Congress' intent with respect to employer violations of § 401(g). As already noted (*supra*, pp. 3-4), the issue here is not whether there is a private cause of action *in addition to* a government action, but whether there is *any* cause of action against employers. Congress opted for different enforcement schemes in the various titles of the LMRDA, *Hall* v. *Cole*, 412 U.S. 1, 10-11 (1973); *Calhoon* v. *Harvey*, 379 U.S. 134, 138 (1964); *Dunlop* v. *Bachowski*, 421 U.S. 560, 566 (1975), and indeed even between different provisions of the same title, see, e.g., *Calhoon*, 379 U.S. at 140. In some instances, Congress authorized only the Secretary to sue; in some, Congress authorized only union members to sue, see, e.g., §§ 402 (Title I), 501(b) (Title V), 29 U.S.C. §§ 412, 501(b); and in others, Congress authorized suits by both the Secretary and union members, see, e.g., §§ 201(c) and 210 (Title II), and 304(a) (Title III), 29 U.S.C. §§ 431(c), 440, 464(a). But nowhere in the statute, with the exception of the ban on employer contributions in § 401(g), did Congress create a duty and provide *no* express cause of action to enforce that duty. The question it whether this silence reflects a congressional decision that this duty is not to be enforced against employers, or an oversight not indicative of congressional intent.

II. THE STATE LAW CAUSES OF ACTION

The complaint, in Counts II and III, alleges that employer contributions to candidates in future USWA elections would violate state law, and seeks an injunction against

such future state law violations. The court below ruled that "the statutory remedies in the [LMRDA] preclude state courts from addressing these issues" (App. 4a). As we showed in the Petition (15-16), this holding conflicts with this Court's declaration in *Trbovich* v. *Mine Workers,* 404 U.S. 528, 531 (1972) ("[w]ith respect to elections not yet conducted, the statute provides that existing rights and remedies apart from the statute are not affected"), as well as with decisions of two other courts of appeals.

Respondents' answer is so obfuscated that we have difficulty addressing it. Respondents' thesis is stated as follows (Br. Op. 9; see also *id.* 11):

> "[I]t follows from the express exclusivity of the statutory remedy provided by Congress [§ 403 of the LMRDA, 29 U.S.C. § 483] that the so-called state law torts of which plaintiffs complain 'are inextricably bound-up in the statutory provisions of Title IV' and, accordingly, are enforceable solely by the Secretary in accordance with federal law."

But this hardly "follows" from § 403, whose only declaration as to "exclusivity" is that

> "The remedy provided by this subchapter for challeng-
> (Emphasis added).

The instant lawsuit does not challenge "an election already conducted"; it seeks an injunction with respect to conduct in future elections. And this Court has already explained, in *Trbovich, supra,* that in suits relating to future elections "remedies apart from the statute are not affected."

If respondents mean that there is something unique about the particular state law claims in this case that makes them "inextricably bound up" with Title IV, the charge is wholly untrue as to Count III of the complaint,[4] and is

[4] Count III alleges that respondents are inducing union members to breach their contractual commitments, contained in USWA's International Union Elections Manual, not to accept employer monies. The Manual is an internal union bylaw whose existence is in no respect dependent upon Title IV. The resolution of any dispute concerning the meaning of the Manual is one which Congress took pains to emphasize in § 403 would *not* be pre-empted by Title IV:

> "Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter.

Count II, on the other hand, *is* related to Title IV, for the state law tort alleged in that Count is that respondents are intentionally subjecting USWA and its members to jeopardy under federal law (i.e. to the risk that USWA's elections will be invalidated under Title IV). This tort could not occur but for the existence of Title IV.

in any event without legal significance. Petitioners are not seeking to enforce Title IV in Counts II and III, they are seeking to enforce state law. Congress defined, in § 403, the limits of the preemptive effect which Title IV would have upon state law. Congress did not decree that state law would be preempted when it was "bound up" with Title IV —whether "inextricably" or otherwise—and there is no warrant for reading into § 403 a preemption which Congress did not intend.

Respondents seek to distinguish one of the court of appeals decisions which we have said conflicts with the decision below, *Amalgamated Clothing Workers* v. *Amalgamated Clothing Workers,* 473 F.2d 1303 (3rd Cir. 1973), on the ground that the cause of action there was grounded in Title I of the LMRDA which "expressly provides for such private enforcement actions" (Br. Op. 10). But that is not a distinction, for New York law expressly authorizes the prosecution of the state law tort claims advanced here. The issue is not whether authorization to sue exists, but, as respondents concede, "the exclusivity of the remedy" prescribed in Title IV. *Id,* The holding in *Amalgamated* is that the Title IV remedy is not exclusive of remedies in pre-election actions, and that holding is equally applicable

whether the pre-election action is grounded in state law or in federal laws other than Title IV.

Respondents' effort to distinguish the other case which we say is in conflict with the decision below, *Ross* v. *International Bro. of Electrical Workers*, 513 F.2d 840 (9th Cir. 1975) is even wider of the mark. *Ross*, like this case, involved a state law tort claim, and the issue was whether that claim was preempted by § 403. Respondents assert that *Ross* held that in determining whether a state law claim is preempted "the crux is not the nature of the relief sought ... but the substantive origin of the claims" (Br. Op. 10). In fact, as the following excerpt makes clear, *Ross* held precisely the opposite: that the "crux" in determining whether § 403 preempts is whether the relief sought is the setting aside of an already-conducted election:

> "On this appeal Duke, supporting dismissal by the district court, contends that the 'sum total' of appellant's complaint is to attack election-related conduct and that his attempt 'to categorize Count IV as an intentional tort or a common law claim cannot be used as a means of circumventing the clear provisions of Title IV.'
>
> "We cannot agree. Title IV and count IV involve different considerations, different harms and different remedies. The facts of this case serve to make this particularly clear. Appellant now has won his election. He does not, in count IV, challenge it or seek any relief which would interfere with operation of the Local pursuant to the election. Appellees make no claim that the Secretary can now compensate Ross for the harm he claims to have suffered not by violation of rights bestowed by Title IV but by tortious conduct at the hands of Duke. Further, the considerations apparently prompting Congress to choose the remedy it chose in § 402—preventing the blocking or delaying of elections by actions brought by individual members—have nothing to do with, and are not frustrated by, the recovery of monetary damages for election-related torts. We perceive no public purpose to be served by prohibiting

> all civil actions to that end *where challenge to the election is not involved and is not the result.*

513 F.2d at 842-843 (emphasis added).

CONCLUSION

This Court should grant certiorari to review the decision below.

Respectfully submitted,

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
DAVID M. SILBERMAN
Bredhoff, Gottesman, Cohen & Weinberg
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Petitioners